In the case before us, however, it is not pretended that the firm obtained the borrowed money from Murray *improperly*. The separate creditors, of Murray, therefore, are not, on account of this claim for money lent by Murray to the firm, entitled to participate with the partnership creditors in the distribution of the joint effects.

Judgment of the common pleas reversed; and ordered that the separate effects of Peter Murray he distributed *pro rata* first among his individual creditors, before any application thereof be made to the payment of the partnership debts of Dever and Murray; and that the partnership effects be applied first to the payment of the partnership debts, irrespective of the claim of the partner Peter Murray, for money lent by him to the firm.

In the Court of Appeals of the State of New York.

THOMPSON, APPELLANT *vs.* KEEREBER, RESPONDENT.

1. Where in an action for damages upon an alleged libel, the judge at the trial instructed the jury that if they found for the plaintiff, the amount of their verdict was in their absolute discretion, and that such discretion was uncontrolled by any legal rule or recognized measure of damages, it was held erroneous.
2. The judge should have charged the jury that if they found for the plaintiff, they should give such an amount of damages as in their opinion would be an adequate compensation to the plaintiff for the injury actually sustained by him: and if the libel originated in malice, in their opinion, they might give such additional damages as they thought would justly punish the defendant.
3. Vindictive or exemplary damages discussed.

This was an action for a libel commenced in October, 1852. The complaint charges that plaintiff was a practising physician and surgeon, engaged in a large business as such; and was also engaged in selling drugs and medicines; and that defendant printed and published of and concerning the plaintiff and of and concerning his said business, the following malicious libel, to wit: "Strangers

looking for my office, after night, will be particular to observe my transparent signs, and be careful not to be deceived by a quack (plaintiff meaning) who has a small pen in one corner of his establishment under my dispensary, with doctor's office printed on the window blinds, calculated to deceive the unwary." And also, "one thus particular in describing the locality of my store as an impostor, not more than the width of a street from me, has been in the habit of misrepresenting his establishment to strangers as mine."

The defendant put in an answer denying the allegations in the complaint, except the allegation of the publication of the matters charged as libelous and justifying the libel.

On the trial, the defendant moved to nonsuit the plaintiff, upon the ground—1. That the plaintiff had not proved he was a practising physician and surgeon, druggist and apothecary. 2. That the words of the alleged libel were not of themselves actionable, and could only be so as they affected the professional character and business of the plaintiff; and 3. That no special damages had been alleged, and none proved. The court refused to nonsuit the plaintiff, and the defendant excepted. The plaintiff, on the trial, offered to prove by one Plomer, that the defendant had threatened to drive the plaintiff out of town by those means; this evidence was objected to but admitted; the witness testified that the defendant said he would drive the plaintiff out of town, and that the plaintiff was no physician. The court charged the jury, "that if they found a verdict for the plaintiff they had a right to give such damages as they in their sound judgment and discretion should think to be right and proper;" to which the defendant excepted. The defendant requested the court to charge the jury that they could not give the plaintiff damages for injuries to his private reputation and character; and could give damages only for such injuries as he had sustained in his business and in his professional character as a physician, surgeon, druggist and apothecary; and that the plaintiff could not recover vindictive damages, and could only recover damages actually sustained in his business, &c., and that the words charged, &c., to be actionable, must relate to the business and character of the plaintiff, &c. The court refused to charge as requested, and the defendant excepted.

The opinion of the court was delivered by

PAIGE, J.—The printed handbill set forth in the complaint and admitted in the answer to have been published by the defendant, was libelous. It was a censorious writing, tending to expose the plaintiff to public hatred and contempt. 3 Johns. Ca. 354; 9 Johns. 215, 1 Den. 347; 7 Cow. 613. It is alleged in the complaint that it was published of and concerning the plaintiff, and of and concerning his business as a practising physician and surgeon, and as a druggist and apothecary, and it charges him with being a *quack*, who had a small pen under the defendant's dispensary; and an impostor, who had been in the habit of misrepresenting his own establishment to strangers as the defendant's. These words are disgraceful to the plaintiff in his profession as a physician, and in his trade and business as a druggist and apothecary. They charge him with ignorance of his profession and want of integrity in conducting his business. Bacon's Abr., Slander, b. 4, section 2; 6 Cow. 88, 89. The evidence was sufficient to authorize the judge to submit to the jury the question whether the plaintiff was a practising physician and surgeon; and also the question whether the libel was written and published of and concerning the plaintiff in his profession and business.

The objection to the evidence offered to be proved by Plomer was properly overruled. The offer was substantially to prove that the defendant had threatened to drive the plaintiff out of town by means of the publication of the alleged libel. This evidence was proper to show the *quo animo* the libel was published. 19 Wen. 296; 8 Wen. 602, 608–9. There is no exception to the testimony actually given by Plomer. If the proof did not come up to the offer, the defendant would have moved to strike it out. The principal question in the case arises on the charge of the judge, and on his refusal to charge as requested, in respect to the measure of damages. The judge charged the jury that if they found a verdict for the plaintiff, they had a right to give such damages as they in their sound judgment and discretion should think to be right and proper; and he refused to charge, that the plaintiff could not recover vindictive damages, or damages for injuries to his private

reputation and character; and that he could only recover damages for injuries sustained in his business and professional character, as a physician, surgeon, druggist and apothecary.

I do not think that the judge erred in refusing to charge, that the plaintiff could not recover damages for injuries to his private reputation and character. The complaint charges that the libel was published of and concerning the plaintiff, and of and concerning his business as a practising physician, and as a druggist and apothecary. The libel was calculated to injure the plaintiff, in his private character as well as in his business and professional character, as a physician, and apothecary. It was published both of and concerning him in his private character, and of and concerning his business. It charges him with ignorance in his profession and want of personal integrity in his business. These charges are disgraceful to him in his private character, as well as injurious to him in his business, and tend to expose him to public hatred and contempt.

Damages are compensatory or exemplary, otherwise denominated punitory or vindictive. A plaintiff is not justly entitled to receive from the defendant damages, as a compensation beyond the extent of his injury; nor ought the defendant to be required to pay to the plaintiff more than he is entitled to receive. 2 Greenl. Ev. sec. 266.

It is quite clear that the ancient common law never allowed the injured party to recover, in addition to an adequate compensation for the whole injury sustained, damages by way of punishment to the wrongdoer. 2 Parson on Cont, pp. 446, 447. Damages were not originally designed for any such purpose. Id. p. 448. This is apparent from the common law distinction between private and public wrongs, and the distinct and dissimilar proceedings provided by the common law for the redress of the former and the punishment of the latter. If we intend to maintain the harmony of the law, we must preserve the fundamental distinction between civil injuries, and crimes and misdemeanors, and between civil and criminal actions; and we must confine each of these classes of actions to their appropriate office; civil actions to the redress of civil injuries; and criminal actions to the punishment of public offences. If we confound these distinct remedies for private and public wrongs, com-

pensation for a civil injury will necessarily lose its due measure of proportion to the injury sustained; and punishment for the public offence by subjecting the wrong-doer to a double punishment will be most likely to exceed the limits of a just retribution. In all cases, a crime or misdemeanor includes a private injury. Every public offence is also a private wrong. It affects an individual as well as the community. Thus a robbery is not only a wrong to the whole community, but also an injury to private property. So an assault and battery, and a libel, are not only public offences as being or tending to a breach of the public peace, but also injurious to the person of the party assaulted or libeled. In cases of felony at common law, the civil remedy, of the party injured, was not merged but only suspended until the offender had been tried. 3 Bl. Com. 6, note 8; Christian notes 1 Chit. Pl. 150, Springf. ed. 1847; *Grimson* vs. *Woodfall*, 2 Car. & P. 41 and note in 12 Com. Law R. 20. Under the revised statutes, the right of action of the person injured by a felony is not merged in the felony. 2 Rev. St. 292.

The doctrine of exemplary damages has not been applied in a civil action for the private injury, in cases of felony; but its application seems to have been confined to civil actions, for compensation for private injuries, in cases of misdemeanors, and in other cases, of an aggravated character, not punishable by indictment, but where there is oppression or gross negligence, or moral turpitude, or atrocity in the defendants' conduct, or where he has been influenced in the perpetration of the injury by malice.

Although the private wrong should be also a public offence, the injured party has no just claim to any penalty imposed upon the wrong-doer, as a punishment for the public offence, that is the reparation the latter makes to the public for his violation of his public duties; duties due to the whole community. If the private wrong is also a public wrong, the prevention of which the interest of the community demands, but which the criminal law does not condemn, the legislature should supply the defect by declaring it a public offence. The defect of the criminal law should not be attempted to be remedied by punishing the public wrong in a civil action for the private injury by allowing the plaintiff to recover more than he is entitled to receive.

The doctrine of vindictive damages stands upon no ground of principle. It diverts the civil action from its legitimate purpose, by allowing the plaintiff to recover a compensation beyond the extent of his injury; to which he is not entitled; it confounds the distinction between public and private remedies, and the established proceedings to enforce them; and it disregards the legal meaning of the term "damages." The legal meaning of this word, is a pecuniary compensation, recompense, or satisfaction given to the plaintiff for an injury actually received from the defendant. 2 Greenl. Ev. sec. 253; 2 Par. on Con. p. 432; Tidd. Prac. 798; Bacon Abr. tit. Damages. "Damna," says Lord Coke, "hath a special signification for the recompense that is given by the jury to the plaintiff for the wrong the defendant hath done unto him." Co. Lit. 257, a. To be a recompense or satisfaction for the injury, they should be precisely commensurate with the injury, neither more or less. 2 Greenl. Ev. sec. 253; 2 Bl. Com. 438. In *Bockwood* vs. *Allen*, 7 Mass. 256, Sedgwick, speaking of the measure of damages, says, "it is a sound rule of law that where an injury has been sustained, the remedy shall be commensurate to the injury sustained."

Damage is defined in Webster, "the estimated equivalent for detriment or injury sustained." 1 Bouvier Law Dic. p. 403, defines damages to be the indemnity given by law to be recovered from the wrong doer by a person who has sustained an injury either in his personal property, or relative rights in consequence of the acts of another. Blackstone says, in the case of injury to personal chattels, as hunting a man's deer, poisoning his cattle, &c., he shall recover damages in proportion to the injury which he proves his property has sustained. 3 Bl. Com. 153.

But it is doubtless true that there are numerous English cases, and many in the courts of this State and of our sister States, and of the United States which sanctioned the doctrine, that in a civil action for libel, slander, assault and battery, false imprisonment, malicious prosecution, seduction, and the like, damages in addition to those necessary to compensate the plaintiff for his actual injury may be awarded to him as a punishment to the defendant, and to operate as an exemple to deter others from committing the like

offence. *Huckle* vs. *Money*, 2 Wil. 205; 3 John. Rep. 63; 66; 14 John. 352 &c. 13 How. 363; 2 Par. on Cont. 449 and cases cited in notes, Sedg. on Dam. 38 to 44. This principle was laid down by the Supreme court in *Tillotson* vs. *Cheetam*, 3 John. 56, in *West* vs. *Jenkins*, 14 John. 352; *Brissee* vs. *Mayber*, 21 Wen. 144; *Cook* vs. *Ellis*, 6 Hill 466; in *Whitney* vs. *Hitchcock*, 4 Den. 563; and by the late Chancellor, in *King* vs. *Root*, in court of Errors, 4 Wen. 139. The decisions on this subject were reviewed by Judge Jewell, in *Taylor* vs. *Church*, in the court of Appeals, 4 Selden, 459, and he came to the conclusion that in actions for injuries to the person, committed under the influence of actual malice or with the intention to injure the plaintiff, the jury in their discretion may give damages beyond the actual injury for the sake of the example, damages not only to recompense the sufferer but also to punish the offender. Three judges in addition to Judge Jewell, expressed their opinion in favor of this proposition and three against it.

In *Dain* vs. *Wychoff*, 3 Sel. 192, Judge Gardner examined this question, and denied the right of a jury in any civil action to award to the plaintiff punitive or vindictive damages as a punishment of the defendant for his offence against society. But the other judges expressed no opinion upon that question. In *Kendall* vs. *Stone*, 1 Sel. 16, Mr. Hill, in his lucid and sententious points, presents with great force and clearness the reasons in support of the propotion that this doctrine of punitive damages stands upon no ground of principle, and why it should be repudiated as an acknowledged principle of law.

The tendency of recent decisions has been to limit the application of the rule of vindictive damages. In *Whitney* vs. *Hitchcock*, 4 Den. 461, the court refused to allow exemplary damages to be recovered by a father for an aggravated assault and battery upon his daughter, whereby he was deprived of her services; and in *Austin* vs. *Wilson*, 4 Cush. 273, the Supreme Court of Massachusetts denied the right of a plaintiff to recover vindictive damages in an action for an injury which was punishable by indictment. The rule, allowing vindictive damages to be recovered, is in most cases practically of but little importance. In nearly all the cases in which

there is such malice, or oppression, or gross negligence, or such moral turpitude, or atrocity in the defendant's conduct, as to justify the giving of exemplary damages, there is some insult or injury to the feelings, some circumstances of indignity and contumely, under which the wrong was committed; and consequent public disgrace to the plaintiff and loss of reputation, producing mental agony, for which the damages cannot be assessed by any definite rule. And in all such cases the discretion of the jury in fixing the amount of the damages as a compensation for the injury is so large and undefined, that the sum awarded will generally be as great as if they were expressly instructed that they were at liberty to give exemplary damages as a punishment to the defendant and an example to deter others from committing similar wrongs, my conclusion is, that the doctrine of punitive damages, stands upon no ground of principle, and ought to be entirely repudiated; and that the judge therefore erred in not charging the jury as requested, that the plaintiff could not recover vindictive damages. But conceding the plaintiff's right in this case to recover exemplary damages, I think that the judge's charge on that subject was erroneous. He charged the jury that they had a right if they found for the plaintiff, to give such damages as they in their sound judgment and discretion should think to be right and proper. In this charge he substantially instructs the jury that the amount of the verdict is in their absolute discretion, and that they are bound by no rule, and restricted within no limits in determining what that amount should be; I do not think I use language which is too strong. For if a judge instructs a jury, that they may give such damages as they, in their discretion, shall think proper, it is in effect saying, that they are at liberty to give the plaintiff whatever amount they please, uncontrolled by any legal rule or measure of damages, and without reference either to what would be an adequate compensation for the injury, or a just punishment of the defendant. I think, under the doctrine of vindictive damages, that the judge should have specially charged the jury that, if they found a verdict for the plaintiff, they should give such an amount of damages as in their opinion would be an adequate compensation to the plaintiff for the injury actually sustained by him; and that

in their discretion they were at liberty in case the evidence satisfied them that the publication of the libel originated in the actual malice of the defendant to give such additional amount, as would in their opinion be a just punishment of the defendant, and be sufficient as an example to deter others from committing a similar offence.

The judge, in not giving such a charge and in charging the jury that the plaintiff had a right to recover such damages as they in their discretion should think to be right and proper, in my judgment, committed an error. My conclusion therefore is, that the judgment should be reversed; but my brethren being of a different opinion, it will be affirmed.

In the Supreme Court of North Carolina, June Term, 1858.

GEORGE HURDLE, ASSIGNEE, &c. *vs.* ORPHEUS S. HANNER.[1]

A set-off can properly be pleaded only where the parties are the same and the debts mutual.

This was an action of debt on a note tried before his honor judge Manly, at fall term 1857, of Alamance Superior Court, plea set-off. The plaintiff proved the execution of a note, payable to one James M. Klapp, for $500, and its endorsement *after due* to himself for value. The defendant affirmed in evidence under his plea of set-off a note payable to himself and signed by the said James M. Klapp, and one Holt, who were partners in trade. This was objected to by the plaintiff, and ruled out by the court. To which ruling the defendant excepted. There was a verdict and judgment for the plaintiff and appeal by the defendant.

[1] Perhaps to the better understanding of the case it should be stated, that by virtue of a statute in North Carolina, an action of debt may be maintained by the indorser of a note; also that by numerous decisions of our Supreme Court, one who takes a note after it is due, takes it subject to all the equities which attached to it in the hands of the payee, including set-offs. It will also be perceived that we have a statute, by force of which all contracts are practically joint and several. Its material terms as affecting this case are quoted in the opinion of the court.—*Reporter.*